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IN THE

Supreme Court of The United States

OCTOBER TERM, 1980

No. 80-689

GARY E. WIDMAR, ET AL.,
Petitioners

—against—

CLARK VINCENT, ET AL.,
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Baptist Joint Committee on Public Affairs respectfully moves this Court, pursuant to Rule 36.3 of its Rules, for leave to file the accompanying brief *amicus curiae* in support of respondents in *Widmar, et al.* v. *Vincent, et al.*, No. 80–689.

The consent of the parties to the filing of the attached brief has been sought by the moving party. While the respondents gave their consent, petitioners, as a matter of policy, withheld their consent. *Amicus*, accordingly, proceeds under Rule 36.3.

The Baptist Joint Committee on Public Affairs is composed of representatives elected by eight national cooperating Baptist conventions and conferences in the United States. They are: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive Na-

tional Baptist Convention, Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention.

The Committee, in part, seeks to apply the traditional Baptist concerns for religious liberty and proper church-state relations to public affairs. It is the position of *amicus* that important elements of both of the religion clauses of the First Amendment are at risk in the case at bar and that Baptist insights will not be presented to the Court unless this brief *amicus curiae* is considered by this Court.

Therefore, *amicus* prays this Court grant this motion and consider its accompanying brief which gives the bases and arguments for its support of respondents' position.

Respectfully submitted,

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BRIEF OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS AS *AMICUS CURIAE*

INTEREST OF THE *AMICUS CURIAE*

The Baptist Joint Committee on Public Affairs (BJCPA) consists of representatives elected by each of eight cooperating Baptist national bodies in the United States: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention. These Baptist groups have nearly 30 million members who evidence a direct interest in church-state relations. One of the mandates of the BJCPA is to respond ". . . whenever Baptist principles are involved in, or are jeopardized through, governmental action." Among Baptists, religious liberty is a fundamental and sacred principle.

Religious liberty is also a fundamental legal right protected by the First and Fourteenth Amendments to the Constitution of the United States. The BJCPA and Baptists generally have long held that a strict separation of church and state is required by the First Amendment. The BJCPA believes in a strict construction of the limits placed on the state by that Amendment. We have supported this Court's establishment decisions which have denied the state the power to support a religion, to define a church's religious mission, to promote or denigrate religious beliefs, or to become excessively entangled with religion. Our support has included filing several *amicus* briefs which were in agreement with this Court's subsequent decisions. We decry attempts by the state to control religious actions absent a compelling state interest which cannot otherwise be served. We are alarmed by state action in the case at bar which, in the opinion of *amicus*, discriminates against an organization *because* it is religious and bases that discrimination on a clearly erroneous reading of the establishment clause.

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the Constitution involved in the case at bar are the First and Fourteenth Amendments to the Constitution of the United States.

QUESTIONS PRESENTED

The decisions below raise three major questions which *amicus* will address in this brief: (1) Is regulation 4.0314.0107, adopted by the Board of Curators of the University of Missouri, Kansas City campus (UMKC), required by the establishment clause of the First Amendment or does that regulation itself fail to conform to the test established by this Court to determine when state action has infringed the establishment clause? (2) Is regulation 4.0314.0107 an affront to the free exercise clause of the First Amendment? (3) Assuming, *arguendo*, that if respondents' on-campus religious activities were not regulated by the state there would be minor elements of establishment present, do the free exercise and free speech

rights of the respondents overbalance the elements of establishment?

STATEMENT OF THE CASE

The facts of the case are well presented in respondents' brief and need not be elaborated here. However, it is important to note that Cornerstone, of which respondents are student members, is an organization of Christian students which is, and for at least four years has been, an officially recognized student organization on the UMKC campus. It has a nucleus of about twenty students who bring speakers to the campus and conduct on-campus meetings and events which have been attended by as many as 125 students.

According to the court below, from 1973 until 1977 Cornerstone sought and obtained permission to use University facilities for its weekly meetings and events. In 1977 this use of facilities was terminated on the grounds that regulation 4.0314.0107, which had been adopted by the Board of Curators of UMKC in 1972, forbade the use of campus facilities "for purposes of religious worship or religious teaching by either student or nonstudent groups." The University later refused a request by Cornerstone that permission be given to hold small group Bible studies on the University lawn.

Eleven student members of Cornerstone initiated this action. UMKC's motion for summary judgment was granted by the United States District Court for the Western District of Missouri. The United States Court of Appeals for the Eighth Circuit reversed and remanded.

SUMMARY OF ARGUMENT

The argument may be briefly summarized as follows:

1. The First Amendment does not prohibit all kinds of religious activities on a public university campus, and the action by the Board of Curators of UMKC to ban the activities of Cornerstone on establishment clause grounds is, in itself, an affront to the establishment clause.

2. The very nature of a university as an educational entity and as a structured society for adult students requires that there be freedom of ideas and freedom of association.

3. The state university campus is a public place in a legal sense and certain religious activities may not be excluded.

4. The actions of the Board of Curators in issuing regulation 4.0314.0107 constitute state action which affronts the free exercise clause in the light of the tests established by this Court.

5. The case at bar exposes some of the tensions which exist between the religion clauses of the First Amendment and thus requires a balancing of constitutional rights and limitations.

ARGUMENT

The First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment, is a limitation on the powers of the government and may not be read as a limitation on the rights of the people. Thus the establishment clause forbids direct or indirect actions by government which establish a religion according to the tests enumerated by this Court in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) at 612, 613. But the establishment clause was not intended, and must not be read, to give to the state the power to use that clause to limit the religious liberty of the people. In the case at bar the Board of Curators of UMKC has read the limits on government found in the establishment clause as bases for actions which limit the religious rights of students. In doing so the Board misused the establishment clause.

It is true that in some instances the state may limit or proscribe certain religious activities—i.e. the free exercise of religion—of individuals and groups, *see Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), but the state may not bootstrap on its legitimate free exercise powers to achieve an unconstitutional power *over* religion.

Amicus argues below that the state has misread, misapplied, and misused the First Amendment in this case.

1. The action by the Board of Curators, as agents of the state, to ban the on-campus religious worship and religious teaching by Cornerstone on establishment grounds is, in itself, an affront to the establishment clause.

Petitioners have argued in essence that they are compelled by the establishment clause of the First Amendment to ban religious worship and/or religious teaching from the campus of UMKC. This is legally not correct and is historically not in keeping with the precepts of some of those who were instrumental in securing the addition of the First Amendment to the Constitution. For example, at Thomas Jefferson's suggestion, the regulations of the University of Virginia provided that

> Should the religious sects of this State, or any of them, according to the invitation held out to them, establish *within*, or adjacent to, the precincts of the University, schools for instruction in the religion of their sect, the students of the University will be free, and expected to attend religious worship at the establishment of their respective sects, in the morning, and in time to meet their school in the University at its stated hour.* (emphasis added).

Jefferson, though he strongly opposed the use of public funds to support religion and religious activities, saw no conflict with the establishment clause if religious groups made provisions for instruction in their religious views or for religious worship "within, or adjacent to, the precincts of the University."

This Court enumerated its tests for determining if state action conforms to the establishment clause in *Lemon*, 403 U.S. at 612, 613:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect

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* Chapter II, §1 of the Regulations of the University of October 4, 1824, quoted by Justice Reed in his dissent in *McCollum* v. *Board of Education*, 333 U.S. 203 (1948) at 246.

> must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster "an excessive government entanglement with religion." (citations omitted).

There is a rebuttable presumption that state actions are a reflection of a secular purpose. It is the contention of *amicus* that the purpose of the Board of Curators in enforcing regulation 4.0314.0107 was to prohibit the student members of Cornerstone from exercising important parts of their religious liberty. Even if the Board's issuing of the regulation appeared on its face to have a secular purpose, it does not follow logically that the unconstitutional purpose of the Board in enforcing regulation 4.0314.0107 is cured by asserting a secular purpose for the issuing of that regulation. *Amicus*, therefore, asserts that the enforcement action by the Board fails the first establishment test.

The principal or primary effect of regulation 4.0314.0107 on its face and in its application is the inhibition of religion. The regulation results in hostility of the state toward religion. The neutrality toward religion which this Court has held is required by the First Amendment was ignored or defied by the Board of Curators in putting the regulation on the books and then, after a period of time, enforcing that regulation. The argument raised by the Board that the absence of such a regulation would constitute state action advancing religion is without merit. Restraint from action in this case would be well within the required neutrality of the state toward religion.

Finally, if the regulation restricting religious worship and religious activity is to be enforced, the state must be committed to a program of continuous monitoring of any activities of Cornerstone or of any other religious group which might be allowed on campus. Even though prayers are permitted at some University functions without, it is assumed, violating the establishment clause, *see* UMKC regulation 4.0314.0107, the state would have to monitor religious groups' activities and determine when a prayer ceases to be permissible and becomes impermissible worship or when Bible reading becomes religious teaching. This would be a classic example of the degree of entangle-

ment of government with religion which this Court decried in *Walz* v. *Tax Commission*, 397 U.S. 664 (1970) at 674.

It is the thrust of case law that state action which directly or indirectly financially supports religious institutions or programs or which favors or promotes religion is contrary to the establishment clause. Such actions are not at issue here. *Amicus* submits that the state has not lived up to the standards required by this Court's interpretation of the establishment clause.

2. The nature of a university and of student life in a university implies the presence of on-campus religious activities.

If a public university is to be true to its nature—genuinely pluralistic, diverse, free, and open to intellectual inquiry—it logically follows that religion has a proper place in the curriculum and in the exchange of ideas that make for a full education. As this Court has pointed out, the American college classroom and the college campus are peculiarly the "marketplace of ideas." *Healy* v. *James*, 408 U.S. 169 (1972) at 180. That marketplace of ideas must include ideas concerning religion as well as ideas concerning irreligion. Under the religion clauses as well as the free association and free speech clauses of the First Amendment, the state is forbidden to set arbitrary limits on the content of speech or on who can associate with whom when—and perhaps if—the content of speech or the reason for association is religious. The state is not devoid of powers in this area, but its powers are circumscribed.

> . . . the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. *Healy*, 408 U.S. at 180.

It is true that some of the public religious worship or teachings of a group such as Cornerstone may be offensive to some. However,

> . . . a function of free speech under our system of government is to invite dispute. It may indeed

> best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. . . . It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not an absolute . . . , is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest. *Terminiello* v. *Chicago*, 337 U.S. 1 (1949) at 4.

There has been no allegation that Cornerstone's activities have presented a clear and present danger of a serious substantive evil.

This Court has pointed out that "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton* v. *Tucker*, 364 U.S. 479 (1960) at 487. Also,

> It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969) at 506.

This Court in *Tilton* v. *Richardson*, 403 U.S. 672 (1971), *Hunt* v. *McNair*, 413 U.S. 734 (1973), and *Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736 (1976), has made distinctions between elementary and secondary schools and post-secondary schools. While *amicus* has not always agreed with these distinctions, they exist and this Court has held that adult students are different from students in elementary and secondary schools. If, as in *Tinker*, this Court has held that the constitutional rights of speech and expression do not stop at the gate of an elementary or secondary school, it must be assumed that rights of at least this magnitude are available to university students. The Board of Curators of UMKC does not seem to agree.

The nature of a university as a marketplace of ideas and of a university community would, in itself, imply the presence and activities of groups such as Cornerstone. The decisions of this Court make it imperative that activities such as those carried on by Cornerstone be available to all students.

3. As a legally public place, a state university may not exclude certain religious activities.

Public property is, by definition, a public place. A public university, such as UMKC, may make some restrictions as to access to and use of facilities and grounds, but when First Amendment rights are involved the nature and scope of those restrictions are severely circumscribed.

> In considering the right of a municipality to control the use of public streets for the expression of religious views, we start with the words of Mr. Justice Roberts that "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." (citations omitted). *Kunz* v. *New York*, 340 U.S. 290 (1951) at 293. *See also Henry* v. *Rock Hill*, 376 U.S. 776 (1964), and, on rights of unpopular religious utterances in public parks, *Sellers* v. *Johnson*, 163 F.2d 877 (C.A.8 1947), *cert. denied*, 332 U.S. 851 (1948).

If public streets and parks must be open for such activities, then so, too, should the buildings and grounds of public universities be open to students and recognized student organizations for "purposes of assembly, communicating thoughts between citizens, and discussing public questions" when it is taken into consideration that the assemblying, communicating and discussing deal with constitutionally protected religious questions.

4. The issuing of regulation 4.0314.0107 was an unconstitutional state action under the free exercise tests established by this Court.

In *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) at 307, it was asserted that "The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged." This is the crux of the problem with regulation 4.0314.0107. The free exercise of religion of a segment of the student body at UMKC has been denied and the right of that segment to communicate information about its religious beliefs has been abridged.

In *Wisconsin* v. *Yoder*, *supra*, tests were given for determining whether state action unconstitutionally limits the free exercise of religion guaranteed by the First Amendment: (1) The court must determine whether or not a legitimate religious belief is held and whether the activity affected by state action is pervasively religious. (2) The court must inquire as to whether the state action places a burden or inhibition on free exercise rights. (3) Assuming an affirmative to these two, the court must decide if the burden is justified by a compelling state interest which cannot be served by less restrictive means.

The facts in the case at bar clearly reveal that Cornerstone is a recognized student religious organization. Its beliefs appear to be legitimately held. No testimony has been offered to the contrary. Similarly, there is no doubt that the Board of Curators of UMKC in issuing and enforcing regulation 4.0314.0107 not only burdened and inhibited free exercise rights but also specifically proscribed the exercise of some of the most important of those rights.

Having, hereby, established that free exercise rights have been violated, we must apply the third prong of the test: Does the state have a compelling or paramount interest which requires or permits limiting the free exercise of religion by the student members of Cornerstone because said interest cannot be served by less restrictive means? The record in this case does not indicate that the state has even attempted to demonstrate a compelling interest in this limitation of the free exercise of religion except to assert that it was compelled to this limitation by the establishment clause. Such an assertion is a *non sequitur* and does

not take into account the primacy given by this Court to First Amendment rights generally and, for present purposes, the free exercise clause particularly.

> [T]he usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. *Thomas* v. *Collins*, 323 U.S. 516 (1945) at 529, 530, *reh. denied*, 323 U.S. 819 (1945).
>
> The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. *Abington* v. *Schempp*, 374 U.S. 203 (1963) at 222, 223.

The student members of Cornerstone have experienced the coercive effect of the enactment and enforcement of regulation 4.0314.0107 on the practice of their religion. UMKC has not demonstrated a compelling interest in prohibiting on-campus religious worship or religious teaching by the students and has made no attempt to show that the regulation was the least restrictive way of serving any such compelling interest. The state has not carried its burden of proof. The action of issuing and enforcing the regulation is clearly unconstitutional.

5. The tensions between the religion clauses of the First Amendment may require a balancing of constitutional rights and limitations.

The Court in *Walz* v. *Tax Commission*, 397 U.S. at 669, spoke of the tensions which exist between the religion causes of the First Amendment and stated:

> The general principle deducible from the First Amendment and all that has been said by the

> Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Amicus submits that the Board of Curators of UMKC, in the absence of regulation 4.0314.0107, would not be sponsoring religion and further submits that the Board, in enforcing the regulation, is certainly interfering with the free exercise of religion by the student members of Cornerstone.

Though *amicus* denies that the Board of Curators acting under the establishment clause was compelled to issue regulation 4.0314.0107, even if it concedes, *arguendo*, that the absence of that regulation could be read as having *an* effect, as opposed to *the primary effect*, of establishing a religion, *amicus* asserts that the "play in the joints" makes it necessary to balance the students' free exercise, free association, and free speech rights against such an infringement of the establishment clause. In the case at bar the balance is clearly in the favor of student rights as against the assumed duty of the Board of Curators.

CONCLUSIONS

Amicus clings to the traditional Baptist firm support of the constitutional requirement of the separation of church and state, and *amicus* holds that this is not the issue in the case at bar. The Board of Curators has not disestablished religion by its action but rather has gone contrary to all the establishment tests set up by this Court. The financial support, promotion, preferment, etc. of religion, forbidden by the Constitution—and forbidden by Baptist concepts of religious liberty—are not at issue here. Interference with the free exercise of religion, free association, and free speech are at issue. For these reasons, *amicus* respectfully requests that the actions of the Board of Curators of UMKC

in establishing and enforcing regulation 4.0314.0107 be declared unconstitutional.

Respectfully submitted,

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